

# *Interaction between Investment Chapters in Mega-Regionals and BITs*



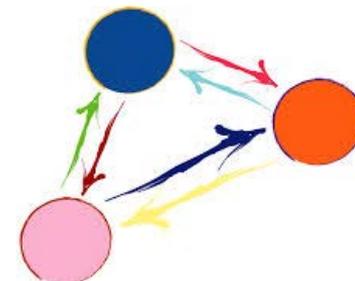
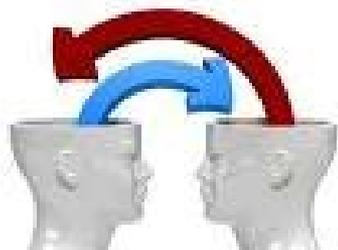
**Conference**

## *Mega-Regionals and the Future of International Trade and Investment Law*

23/24 October 2014 in Dresden

**Prof. Dr. Karsten Nowrot, LL.M. (Indiana)**

University of Hamburg, Germany



## Overview

- **Approaching the subject in three steps**
  - **Why** are we discussing the interaction between investment chapters in Mega-Regionals and BITs?
    - ❖ Underlying factual background of the issue
  - **How** can we systemize the various potential interactions in this regard?
    - ❖ Identification of two main dimensions of interaction
  - **What** are the expected consequences of these interactions for the future development of international investment law as a whole?
    - ❖ Some tentative conclusions

## Factual Background

- **Two factual dimensions of the issue**
  - **Short-term perspective:** relationship with currently existing BITs
  - Investment chapters in mega-regionals **overlapping** with existing BITs between the negotiating parties
    - Source: UNCTAD WIR 2014, p. 119
    - ❖ E.g. Comprehensive Economic and Trade Agreement (CETA): **7 BITs**
    - ❖ Transatlantic Trade and Investment Partnership (TTIP): **9 BITs**
    - ❖ Transpacific-Partnership (TTP): **14 BITs**
    - ❖ Regional Comprehensive Economic Partnership (RCEP): **68 BITs**

## Factual Background

- **Two factual dimensions of the issue**
  - **Middle-term perspective:** relationship to future BIT making
  - Investment chapters in mega-regionals as a factor potentially affecting negotiation processes and outcomes with regard to new BITs
    - ❖ Mega-regionals as a new important phenomenon in the international economic system
    - ❖ International investment law as an increasingly fragmented area of international economic law
      - Current “reformation” of international investment law
    - ❖ Mega-regionals as an opportunity for consolidation

## Two Dimensions of Interaction

- **Two levels of interaction**
- **Applicability-oriented perspective**
  - Legal approaches in mega-regionals towards overlapping BITs between (some of) the parties
  - Two basic options
    - ❖ **Parallelism**
      - Currently prevailing in the practice of RTAs in general
      - Challenges of coordinating the two (or more) different investment treaty regimes
        - » E.g., avoidance of parallel or subsequent investment arbitration proceedings
        - » potential normative inconsistencies with regard to substantive protection standards

## Two Dimensions of Interaction

- **Applicability-oriented perspective**

- **Parallelism**

- ❖ Coordination challenges: comparable to the relationship between, e.g., investment chapters in “ordinary” RTAs and BITs
- ❖ No certainty whether some of the currently negotiated mega-regionals will adopt this approach
  - E.g., no information available on TTP, RCEP
- ❖ Certainty that some of the currently negotiated mega-regionals will **not** adopt the approach of parallelism ...

## Two Dimensions of Interaction

- **Applicability-oriented perspective**
  - **Inter-regional consolidation**
    - ❖ Approach: avoidance of treaty overlap through **termination** of existing BITs between (some of) the parties
    - ❖ E.g., Draft Article X.07 (1) CETA: “This Agreement replaces the agreements between Member States of the European Union and Canada listed in Annex (Y). The provisions of such agreements shall cease to apply from the date of entry into force of this Agreement.”
      - Transition period of three years, Draft Article X.07 (3) CETA

## Two Dimensions of Interaction

- **Applicability-oriented perspective**
  - **Inter-regional consolidation**
    - ❖ Approach to be expected also for example with regard to TTIP
    - ❖ Challenge: Termination of BITs by mutual consent of the parties and the scope of application of “survival clauses” in BITs?
      - E.g. Article XIV Canada-Poland BIT 1990: “[...] In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles I to XIII inclusive of this Agreement shall remain in force for a period of twenty years.”
      - Potentially a long kind of “temporary” parallelism ...

## Two Dimensions of Interaction

- **Content-oriented perspective** as the second dimension of interaction
  - Influence exercised by Mega-Regionals on the substantive and procedural provisions of BITs and vice versa
  - Two basic approaches identifiable
  - **“Plain” analytical approach:** mutual influences currently given and/or to be expected for the future
    - ❖ Investment chapters of mega-regionals as part of the international normative framework on foreign investments

## Two Dimensions of Interaction

- **Content-oriented perspective**
  - Two basic approaches identifiable
    - **“Savior approach”**
      - ❖ Underlying perception: international investment law as a fragmented field in need of consolidation
      - ❖ Investment chapters in mega-regionals as a new “promising” opportunity for promoting coherence in the realm of international investment agreements

## Two Dimensions of Interaction

- “**Savior approach**”

- ❖ E.g., UNCTAD WIR 2014, p. 118 et seq.: “Once concluded, these are likely to have a major impact on global investment rule making [...] Negotiations on megaregional agreements may present opportunities for the formulation of a new generation of investment treaties that respond to the sustainable development imperative.”

- Two main questions

- ❖ Is such a scenario **likely** to evolve?

- ❖ Is such a de facto multilateralization of international investment law a **desirable** development in the first place?

## Expected Consequences of these Interactions

- **Expected consequences of respective interactions between mega-regionals and BITs**
  - **“Micro”** (legal **dogmatic**) perspective
    - ❖ various normative issues arising from the interaction between mega-regionals and BITs
  - **“Macro”** (legal **policy**) perspective
    - ❖ Focus: future development of international investment law as a whole

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